

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY RUDOLPH, JR,

Defendant-Appellant.

UNPUBLISHED

June 16, 2009

No. 286010

Wayne Circuit Court

LC No. 05-003193-FC

Before: O’Connell, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right the sentences imposed on remand on his jury trial convictions for two counts of criminal sexual conduct in the first degree (CSC I), MCL 750.520b(1)(h)(ii) (sexual penetration of a physically helpless victim), and one count of criminal sexual conduct in the second degree (CSC II), MCL 750.520c(1)(h)(ii) (sexual contact with a physically helpless victim).¹ On resentencing, the trial court again sentenced to concurrent terms of 30 to 50 years in prison for each CSC I conviction, and 90 months to 15 years in prison for the CSC II conviction. Because defendant’s sentences were proportionate to the seriousness of the circumstances surrounding the offenses and the offender, the upward sentence departure was based on objective and verifiable factors, a finding that the offense characteristics were given inadequate weight as revealed in the record evidence, and the reasons given for justifying the departure are substantial, compelling, and of considerable worth in deciding the sentence, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant’s crimes involve the repeated sexual assault of a 51-year-old woman who suffered from advanced progressive multiple sclerosis (MS). At the time of the assaults, the victim had been rendered virtually immobile by her disease, and could no longer speak.

In his initial appeal, this Court affirmed defendant’s convictions, vacated defendant’s CSC I sentences, and remanded for resentencing. This Court found that the trial court had mis-scored offense variable (OV) 11 (number of criminal sexual penetrations) and OV 12 (contemporaneous felonious criminal acts). *People v Rudolph*, unpublished per curiam opinion

¹ Defendant was acquitted of two additional counts of CSC I and two counts of assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g(1).

of the Court of Appeals, issued April 24, 2007 (Docket no. 266778), slip op at 7-9. This Court held that resentencing on defendant's CSC I convictions was required, even though the trial court had exceeded the guidelines, because the court had not clearly indicated that it would have imposed the same sentence despite the recommended guidelines range. *Id.*, slip op at 10.

On remand, the trial court again found that the initial sentences were appropriate under the circumstances, notwithstanding the change in the guidelines change. The trial court again focused on defendant's conduct, his relationship to the victim, and her helplessness to justify the sentence.

Defendant again argues that the trial court's sentence was impermissibly based on his earlier conviction, and was disproportionate. After reviewing defendant's arguments, we agree with and adopt this Court's previous comprehensive discussion of defendant's claims of error:

However, because the issue will likely arise on remand, we address defendant's challenge to the trial court's departure from the sentencing guidelines range on its merits. Although we recognize that, by remanding this case for resentencing, the trial court must decide anew whether an upward departure from the guidelines range is appropriate, we note that when originally sentencing defendant, the trial court properly identified substantial and compelling reasons justifying the imposition of a minimum sentence significantly higher than the range identified in the guidelines.

There is no preservation requirement when a trial court departs from the guidelines range at sentencing. *People v Kimble*, 470 Mich 305, 311-312; 684 NW2d 669 (2004). We review the existence of a particular factor supporting a departure from the sentencing guidelines range for clear error. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). We review the determination whether the factor is objective and verifiable de novo. *Id.* We review the extent of the departure and whether the reason for the departure is substantial and compelling for an abuse of discretion. *Id.* at 264-265; *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). An abuse of discretion exists when the sentence imposed is not within the range of principled outcomes. *Babcock, supra* at 269.

A trial court must impose a sentence within the sentencing guidelines range, unless a substantial and compelling reason to depart from the guidelines exists. MCL 769.34(2); *People v Johnigan*, 265 Mich App 463, 468; 696 NW2d 724 (2005). The trial court's reasons for departing from the guidelines must be objective and verifiable.¹⁰ *Abramski, supra* at 74. Further, "the reasons justifying departure should 'keenly' or 'irresistibly' grab our attention, and we should recognize them as being 'of considerable worth' in deciding the length of a sentence." *People v Fields*, 448 Mich 58, 67; 528 NW2d 176 (1995). The trial court must articulate on the record its reasons for departing from the sentencing guidelines range. MCL 769.34(3). "The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record . . . that the characteristic has been given inadequate

or disproportionate weight.” MCL 769.34(3)(b). However,”[w]e may uphold a sentence that departs from the guidelines where some of the reasons given are substantial and compelling while others are not, provided that we are able to determine that the trial court would have departed to the same extent on the basis of the permissible factors alone.” *Johnigan, supra* at 469.

¹⁰ The *Abramski* Court noted, “The phrase ‘objective and verifiable’ has been defined to mean that the facts to be considered by the court must be actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed.” *Abramski, supra* at 74.

Even if a departure from the minimum sentencing guidelines is justified, “the trial court must articulate on the record a substantial and compelling reason to justify the particular departure imposed.” *Babcock, supra* at 260.

In determining whether a sufficient basis exists to justify a departure, the principle of proportionality--that is, whether the sentence is proportionate to the seriousness of the defendant's conduct and to the defendant in light of his criminal record--defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed. [*Id.* at 262.]

The principle of proportionality requires that a sentence “be proportionate to the seriousness of the circumstances surrounding the offense and the offender.” *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

In this case, the trial court stated the following in the Sentencing Information Report Departure Evaluation form:

Defendant was convicted of genital and anal penetration of a disabled crippled nursing home patient as well as sexual contact. This violation of a helpless nursing home patient is reprehensible. It is further aggravated by the fact that evidence was presented during trial that Defendant Rudolph was a licensed medical doctor. He violated one of the most sacred relationships that exists (the patient-physician relationship) by raping a patient in a nursing home.

At sentencing, the trial court noted that defendant had one prior conviction in federal court of conspiracy to distribute controlled substances. The trial court also highlighted the fact that the victim had to be “picked up and moved to the edge of the bed” for defendant to effectuate the 2004 sexual offenses, and that the victim

was left unclothed below her waist, exposing her to humiliation when she was found. Further, the trial court noted that the victim defecated on herself during the 2001 sexual assault. Finally, the trial court relied on evidence that defendant was in a position of authority over the victim at the time of both incidents. The trial court did not abuse its discretion in finding that these circumstances constituted substantial and compelling reasons for an upward departure from the sentencing guidelines range.

Contrary to defendant's argument on appeal, the evidence at trial supported and justified the trial court's upward departure from the guidelines range. Martinez testified that she observed the victim, who was unable to move independently, on the left side of her bed early in the evening of June 21, 2004. She found the victim lying on the opposite side of the bed in a fetal position with her buttocks unclothed approximately three hours later, soon after she saw defendant leave the victim's room. Further, evidence presented at trial indicated that defendant anally penetrated the victim in 2001 and that she was found immediately thereafter with feces on her legs and buttocks.

Although a trial court may not make an independent finding of guilt with respect to a crime for which a defendant has been acquitted, and then sentence the defendant on the basis of that finding, the court in fashioning an appropriate sentence may consider the evidence offered at trial, *People v Gould*, 225 Mich App 79, 89; 570 NW2d 140 (1997), including other criminal activities established even though the defendant was acquitted of the charges, *People v Coulter (After Remand)*, 205 Mich App 453, 456-457; 517 NW2d 827 (1994), and the effect of the crime on the victim. *People v Girardin*, 165 Mich App 264, 266; 418 NW2d 453 (1987). [*People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998).]

Notwithstanding defendant's acquittal of the charges stemming from the 2001 incident, the record evidence supported the trial court's finding that the victim defecated on herself when defendant sexually assaulted her in 2001. Accordingly, the trial court based its reasons for departure from the sentencing guidelines range on objective and verifiable factors. See *Abramski, supra* at 74.

Moreover, although defendant's position of authority and the physical condition of the victim were addressed in the guidelines, the trial court properly concluded that these factors were given inadequate weight. MCL 769.34(3)(b); *Abramski, supra* at 74. OV 10 considers whether a defendant exploited a vulnerable victim when committing the sentencing offense.¹¹ MCL 777.40. The trial court scored ten points for OV 10 because defendant exploited the victim's physical disability by committing the offense. However, defendant was a physician working as a phlebotomist at the victim's nursing home at the time of the 2001 and 2004 incidents. The sentencing guidelines do not address the relationship of a medical care provider, whether a physician or a phlebotomist, and a physically incapacitated patient in a nursing home.¹² Further, the

sentencing guidelines do not address defendant's gross violation of the trust inherent in the physician-patient relationship (or in any relationship between a patient and a medical care provider) when he sexually assaulted the victim. Defendant's acts keenly and irresistibly grabbed the trial court's attention (and grab our attention) as particularly disgusting and egregious conduct going far beyond the bare requirements of the elements of the offense.¹³

¹¹ MCL 777.40(1) states:

Offense variable 10 is exploitation of a vulnerable victim. Score offense variable 10 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) Predatory conduct was involved. . . 15 points

(b) The offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status. . . 10 points

(c) The offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious. . . 5 points

(d) The offender did not exploit a victim's vulnerability. . . 0 point

¹² Admittedly, MCL 777.40 would also permit the trial court to score ten points for OV 10 if it concluded that defendant "abused his . . . authority status." "Abuse of authority status" means a victim was exploited out of fear or deference to an authority figure, including, but not limited to, a parent, physician, or teacher." MCL 777.40(3)(d). Accordingly, OV 10 only allows the sentencing court to consider whether a defendant exploited his relationship with a patient by using fear or coercion to force the victim to submit. However, the evidence available to the sentencing court did not indicate that defendant used his status as a physician and a phlebotomist to coerce the victim to engage in sexual activity, because the victim lacked the physical and communicative capacity to consent or actively engage in sexual activity. Instead, defendant exploited his status as a medical care provider to gain access to a physically helpless, noncommunicative, immobile woman, with whom he could engage in sexual activity without receiving physical or verbal resistance.

¹³ The trial court judge noted that the case was "one of the more disturbing cases that [he's] ever encountered in [his] 11-year career as a judge."

Finally, we find no abuse of discretion in the trial court's conclusion that the circumstances surrounding the offense justify a substantial upward departure from the guidelines.

[I]n considering whether to depart from the guidelines, the trial court must ascertain whether taking into account an allegedly substantial and compelling reason would contribute to a more proportionate criminal sentence than is available within the guidelines range. In other words, if there are substantial and compelling reasons that lead the trial court to believe that a sentence within the guidelines range is not proportionate to the seriousness of the defendant's conduct and to the seriousness of his criminal history, the trial court should depart from the guidelines. [*Babcock, supra* at 264.]

Again, substantial and compelling reasons existed in this case to justify an upward departure from the guidelines range. First, the nature of defendant's prior convictions is objective and verifiable. The trial court noted that defendant was convicted in 1983 in federal court of two counts of conspiracy to distribute controlled substances and was sentenced to a term of two years' imprisonment. Contrary to defendant's argument on appeal, lack of an extensive prior record is not sufficient to overcome the presumption of proportionality. *People v Piotrowski*, 211 Mich App 527, 533; 536 NW2d 293 (1995). Moreover, the circumstances surrounding the instant offenses established the serious and reprehensible nature of defendant's crimes. The evidence available to the trial court at sentencing indicated that defendant sexually assaulted the physically disabled victim in her nursing home bed on at least two separate occasions. Accordingly, defendant's prior convictions and the egregious nature of his crimes constitute substantial and compelling reasons to depart upward from the guidelines range to impose a minimum sentence proportionate to the serious nature of defendant's offense. [*Rudolph, slip op* at 10-14.]

We agree with our previous panel's evaluation that the trial court's reasons for departure were objective, verifiable, and substantial and compelling. We further conclude that defendant's focus on an allegedly improper use of his prior conviction is without merit. It is clear that the trial court relied on the other factors in determining the proper sentence for defendant. And we likewise conclude that defendant's sentences were proportionate.

Defendant also argues that he was unconstitutionally penalized for his decision to go to trial. In support of his claim, he offers evidence that he was offered a plea bargain during the middle of trial with a 108-month minimum sentence after the trial court heard testimony about the victim's helpless condition. As did the panel that reviewed this issue during defendant's initial appeal, we disagree. Although defendant argues otherwise, the trial court did not improperly increase his minimum sentence solely because he chose to forgo the plea agreement and proceed to trial. *People v Sickles*, 162 Mich App 344, 365; 412 NW2d 734 (1987).

Defendant also argues, as he did previously, that he should be resentenced before a different judge. As noted above, defendant has not shown that the trial court acted improperly

during sentencing. Nor has defendant presented anything to show that the trial court was improperly biased. See *People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997).

Affirmed.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio